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In The

Supreme Court of the United States

October Term, 1992

REGIE NATIONALE DES USINES RENAULT, S.A.,

Petitioner,

vs.

LAURA ANN VERMEULEN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that Regie Nationale des Usines Renault (RNUR) had sufficient contacts with the state of Georgia to support the exercise of jurisdiction in a product liability action alleging the defective design of a model of automobile?

2. Whether RNUR's alleged entitlement to treatment as a foreign sovereign, never raised in the trial court, compels a finding that personal jurisdiction over RNUR did not exist?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

Respondent in the above-styled action respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. None of the considerations justifying review on certiorari are met in this case. Accordingly, Respondent requests that the Petition be denied.

CITATION TO OPINIONS BELOW

The opinions by the Eleventh Circuit Court of Appeals are officially reported. The opinion upon which RNUR's petition is based is reported as *Vermeulen v.*

Renault U.S.A., Inc., 975 F.2d 746 (11th Cir. 1992) (Appendix E to the petition). That opinion was superseded on March 22, 1993, in *Vermeulen v. Renault U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993). Citations to facts and legal findings of the Eleventh Circuit in this brief are cited to these opinions.

STATEMENT OF THE CASE

On February 16, 1988, Laura Ann Vermeulen had a wreck near Lawrenceville, Georgia. 975 F.2d at 748. She sustained a spinal injury that has left her quadriplegic. *Id.* On April 18, 1989, she filed suit against, among others, Regie Nationale des Usines Renault (RNUR), alleging that her injuries arose out of the defective design of the passenger restraint system in her Renault LeCar. *Id.*

Ms. Vermeulen did not buy her car from a Renault dealer; she bought it from her brother when both were residents of North Carolina. *Id.* Later, and prior to her wreck, Ms. Vermeulen became a resident of Georgia.

Soon after suit was filed, RNUR moved to dismiss the complaint against it on the ground of lack of personal jurisdiction. *Id.* In opposition to the motion Ms. Vermeulen submitted evidence in the form of several written agreements between RNUR and American Motors Sales Corporation (AMSC) relating to the importation and distribution of cars manufactured by RNUR. 975 F.2d at 749. Under these agreements, at all times relevant to the complaint AMSC was the exclusive marketer and distributor of Renault cars in the United States, *Id.*, and therefore was

obviously the exclusive marketer and distributor in Georgia.

The expressly stated goal of the agreements between AMSC and RNUR was to promote the widest distribution of Renault products and to develop a dealer network for Renault products in the United States. *Id.* These purposes were achieved through AMSC's permissive use of the Renault trademark, 975 F.2d at 750; cooperative planning and development of themes and strategies, *Id.*; advertising in all states, *Id.*; and appointment of Renault dealers by AMSC. *Id.*

These dealerships were created through a joint venture in which RNUR and American Motors Corporation provided financing for the dealers' operations. 975 F.2d at 751. Six dealerships were located in Georgia. 975 F.2d at 752. A booklet in the LeCar owned by Laura Ann Vermeulen advised the owner that Renault's "16,800 Branches, Distributors, and Dealers throughout the world are just like helpful neighbors, being qualified and equipped to offer the motorist all the services he requires for driving with peace of mind". *Id.*

Recognizing that the sale of automobiles would give rise to legal claims regarding those automobiles, RNUR agreed to reimburse AMSC for warranty work on Renault cars. 975 F.2d at 750. RNUR also agreed to hold AMSC harmless and indemnify it against any judgment from a lawsuit alleging design or other defects in Renault cars. *Id.* RNUR reserved the right to take over the defense of any lawsuit naming AMSC if it chose to do so. *Id.*

RNUR profited as a result of these activities. In 1980, RNUR led all auto manufacturers in import sales

improvement. 975 F.2d at 753. It led the same category in 1981. *Id.* More than 37,000 Renaults were sold in the United States in both 1980 and 1981, more than 50,000 in 1982, and more than 40,000 in 1983. *Id.* The sale of these vehicles and components and service parts earned over $1.3 billion dollars during that four year period. *Id.* In 1984, the United States was the largest market for Renault sales outside of France. *Id.*

RNUR does not contest any of these facts. What these facts and their logical inferences establish is that RNUR purposefully acted to create and service a market for its cars in all states in this country. The sole question presented for review is whether, because RNUR's contacts with the state of Georgia were identical to its contacts with the other forty-nine states, it is immune from jurisdiction in Georgia for a claim of a design defect in one model of its cars.

SUMMARY OF THE ARGUMENT

Evidence that a manufacturer intended to distribute its products in every state of the United States is, at a minimum, circumstantial evidence that it intended to distribute its products in Georgia. Evidence that RNUR designed the LeCar for all states, that it advertised the LeCar in all states, that it established dealerships in all states and directed the owner to particular dealerships in Georgia for repairs, and that it marketed the LeCar through AMSC who agreed to serve as the sales agent in all fifty states, is sufficient prima facie evidence of jurisdictional contacts to comport with the due process clause.

It is not necessary that the particular car that caused the Plaintiff's injuries be sold in the forum state. The requirement for the exercise of jurisdiction is that the claim be related to the defendant's forum-directed activities. Where, as here, a design defect is alleged, it is sufficient that the specific LeCar came to Georgia as the inevitable result of the system created by RNUR.

RNUR never raised the issue of the Foreign Sovereign Immunities Act until after its motion for rehearing or en banc consideration was denied by the Eleventh Circuit. Like any other affirmative defense, this defense was waived by failure to present it to the trial court.

Even had the FSIA issue been properly raised and preserved, it has no effect on the issue of personal jurisdiction. The requirements of due process are the same whether considered under the Fifth Amendment or the Fourteenth Amendment. RNUR's contacts with Georgia were sufficient to support jurisdiction.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT RNUR HAD SUFFICIENT CONTACTS WITH THE STATE OF GEORGIA TO SUPPORT THE EXERCISE OF DIVERSITY JURISDICTION BY THE FEDERAL DISTRICT COURT.

A. THE ELEVENTH CIRCUIT's RULING WAS PROPERLY FOUNDED ON RNUR's CONTACTS WITH THE STATE OF GEORGIA

The placement of a product into the stream of commerce, without more, is not an act of the defendant

purposefully directed toward the forum state sufficient for a finding of minimum contacts; additional conduct of the Defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987). The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation and intent that they will be used by consumers in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). So long as a commercial actor's efforts are purposefully directed toward residents of the forum state, this Court has consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

RNUR and Ms. Vermeulen are not in dispute that these principles of law control the outcome of this case. The difference between their positions is actually very simple: RNUR insists that purposeful contact may not be found unless there is a finding of specific and exclusive contact with the forum state. Thus, RNUR complains that the Eleventh Circuit's finding that RNUR vehicles were

advertised everywhere in the United States is not a specific advertisement designed for Georgia alone. Petition for Certiorari, p. 8. Similar distinctions are made concerning other findings by the Court of Appeals regarding RNUR's contacts with all states, including Georgia. Petition for Certiorari, pp. 7-10.

This concentration on specific contacts, rather than intentional contacts, is disingenuous. Ms. Vermeulen is not required to tick off boxes on some mechanical list of contacts in order to have her claim against RNUR heard. Rather the question is whether RNUR purposely availed itself of the privilege of conducting business in Georgia such that it could reasonably anticipate being haled into court there. 975 F.2d at 757. Ms. Vermeulen is not required to negate every theory except that contacts were with Georgia; only a prima facie case is required. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988). All favorable inferences are required to be drawn in her favor. *Id.*

RNUR does not seriously dispute that the LeCar was designed to be marketable in every state. Nor is there any dispute that the LeCar was advertised in a nationwide campaign. The establishment of a nationwide system of Renault dealers is undisputed, as is the presence of six Renault dealers in Georgia. It is undisputed that, by contract, AMSC was the sales agent for RNUR and that the sales territory included all fifty states. Obviously, Georgia is included in the ambit of all of these purposeful activities. RNUR contends that due process will not permit the consideration of these activities because they are not directed specifically and exclusively toward Georgia. Unsurprisingly, no authority for this proposition is cited.

Rather, there is nothing unusual in considering purposeful contacts with all states to include the forum state. *See Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir. 1980), *cert. denied*, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980)

The underlying rationale of the decision by the Court of Appeals in this case is entirely logical. If RNUR wishes to avoid jurisdiction in the face of this evidence, then it bears the responsibility of providing evidence that Georgia was *not* included within these purposeful activities. Absent such evidence, a prima facie case is presented and jurisdiction may be exercised. On this record, no basis for certiorari is presented. The petition should be denied.

B. LAURA ANN VERMEULEN's CAUSE OF ACTION IS SUFFICIENTLY RELATED TO RNUR's CONTACTS WITH GEORGIA TO SUPPORT THE EXERCISE OF JURISDICTION.

In order for the exercise of jurisdiction to comport with due process, the cause of action must relate to or arise out of a defendant's contacts with the forum. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-417, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). The focus of the inquiry is into the relationship between the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977). Obviously, the individual acts of the plaintiff cannot by themselves give rise to jurisdiction and are not the focus of the inquiry. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Relying on this authority, RNUR seeks to make the sole focus of the jurisdictional inquiry Laura Ann Vermeulen's moving to Georgia with a vehicle purchased elsewhere. RNUR's reformulation of the rule is that there may be no exercise of jurisdiction, regardless of the defendant's contacts with the forum, unless the particular product was purchased by the plaintiff in the forum state. None of this Court's holdings on the issue of jurisdiction support such a rule.

Ms. Vermeulen's cause of action is based upon an allegation that her Renault LeCar contained a design defect, one that is common to all similar vehicles. That this particular LeCar restraint system injured Ms. Vermeulen is a matter of fortuity; she could as easily have purchased a used Renault in Georgia from one of the authorized Renault dealers. It is precisely to avoid the effect of such random events that the due process limits on personal jurisdiction were designed to provide a degree of reasonableness and predictability.

RNUR created a market for its products in all fifty states, including Georgia. It intentionally created the structure through which it could service the market in Georgia. The owner's manual in Ms. Vermeulen's LeCar invited her to use the services of Renault dealers in Georgia. On these facts, it cannot reasonably be contended that RNUR could not anticipate being haled into court in Georgia to defend against a claim of defect. Indeed, its agreements with AMSC, by asserting a right to take over the defense of lawsuits, affirmatively disclose

RNUR's recognition that its activities could result in lawsuits over design defects.[1]

RNUR's own affirmative acts created a system whereby its automobiles would be used in Georgia. This included both automobiles originally sold here and those that were brought here because of or in reliance upon RNUR's service of the market in Georgia. It is to this system created by RNUR that the cause of action is related. That relation is sufficient to support the exercise of jurisdiction.

II. RNUR's LATE ASSERTION OF THE DEFENSE OF FOREIGN SOVEREIGN IMMUNITY DOES NOT DEPRIVE THE FEDERAL DISTRICT COURT OF JURISDICTION.

A. BY FAILING TO RAISE THE DEFENSE IN THE TRIAL COURT, RNUR WAIVED ANY ENTITLEMENT TO TREATMENT AS A FOREIGN SOVEREIGN.

Although immunity under the Foreign Sovereign Immunities Act is a bar to subject matter jurisdiction, it is unique among issues of subject matter jurisdiction in that it may be waived by the foreign state, either explicitly or implicitly. 28 U.S.C. § 1605(a)(1). An affirmative defense

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[1] The fact that RNUR reserved the right to take over lawsuit defense is not a contact with the state of Georgia upon which jurisdiction can depend. However, it is difficult to conceive of any greater indication of the reasonableness, in due process terms, of a defendant anticipating being haled into court than its own specific acknowledgment that its activities, carried out in every state, could give rise to design defect lawsuits.

not raised in the trial court, and raised for the first time on appeal, is generally considered waived. *E.g. Golden Oil Co., Inc. v. Exxon Co., U.S.A.*, 543 F.2d 548 (5th Cir. 1976). Since sovereign immunity is an affirmative defense, it is waived by failure to plead in the answer. *Canadian Overseas Ores, Ltd. v. Compania De Acero Del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984). *See also U.S. v. Crawford Enterprises, Inc.*, 643 F.Supp. 370 (S.D.Tx. 1986); *Barragan v. Banco BCH*, 188 Cal.App.3d 283, 232 Cal.Rptr. 758 (Cal. 1987); *Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 503 N.Y.S.2d 555, 494 N.E.2d 1055 (N.Y. 1986). Other litigation situations in which a response of immunity should reasonably be expected may also result in waiver. *Crawford Enterprises, supra.*

RNUR's Answer, filed more than three years ago, does not raise the defense of sovereign immunity (R. 1-8). Three years of litigation have revolved precisely around the issue of the nature of RNUR's business and its involvement with the United States. Litigation of those issues did not result in the raising of a sovereign immunity defense. The defense was never asserted until after RNUR had lost its petition for rehearing or en banc consideration before the Eleventh Circuit.

The permission of sovereign immunity in U.S. courts is a matter of comity and forbearance rather than a constitutional imperative. *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The party seeking such immunity is required to raise the issue in a timely manner – in its answer. When the defense has not been raised after three years of litigation, it is waived.

The reason that a party raising the defense of foreign sovereign immunity is required to do so in a timely manner or be held to have waived the defense is that resolution of entitlement to the defense is a question of fact. Proper evidence, tested by the adversary process, is required to support foreign sovereign immunity. *See, e.g., Sesostris, S.A.E. v. Transportes Navales, S.A.*, 727 F.Supp. 737 (D.Mass. 1989); *Outboard Maritime Corp. v. P.T. Indonesian Consortium of Construction Industries*, 575 F.Supp. 1222 (S.D.N.Y. 1983).

Clearly, RNUR has submitted evidence in the trial court in this case that it was owned by the French government. 975 F.2d 746, 748. Absent the defense of foreign sovereign immunity which was never asserted, however, that fact is immaterial. Whether RNUR was owned by the French government or a private French citizen is simply not relevant to whether its contacts with the state of Georgia were sufficient to support diversity jurisdiction under 28 U.S.C. § 1332, which is the only issue which was raised in the trial court. Laura Ann Vermeulen therefore had no reason to investigate or challenge RNUR's assertion of state ownership, or to determine whether there was an express waiver of sovereign immunity by the French government, or investigate any of the myriad factual issues involved in the defense of foreign sovereign immunity.[2]

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[2] Inexplicably, after denying RNUR's Motion to Vacate, which was based upon the late assertion of the foreign sovereign immunity defense, the Eleventh Circuit entered an order which accepted the defense as factually true. *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534. RNUR may now contend that this order is the law of the case, precluding Ms. Vermeulen from

It was RNUR's responsibility to properly present the issue of foreign sovereign immunity to the trial court and by extension to the Eleventh Circuit. It was RNUR's waiver of the defense, by failure to properly and timely present it, that resulted in this case being decided without reference to the Foreign Sovereign Immunities Act. RNUR should not now be heard to complain of the inevitable result of its own failure to plead and argue an affirmative defense. The petition for certiorari should not be granted on this ground.

B. WHETHER IT WAS A FOREIGN SOVEREIGN OR A PRIVATE CITIZEN, RNUR HAD SUFFICIENT CONTACTS WITH GEORGIA TO SUPPORT THE EXERCISE OF JURISDICTION.

RNUR has not cited a single case, or indeed any other authority, which stands for the proposition that the due process test for jurisdiction would be stricter if personal jurisdiction is based on the provisions of 28 U.S.C. § 1330(b) than if based on 28 U.S.C. § 1332. Put another way, RNUR's Foreign Sovereign Immunities Act defense affects the Eleventh Circuit's finding of personal jurisdiction if and only if contacts found sufficient to satisfy the Due Process clause of the Fourteenth Amendment may

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litigating the factual basis of the foreign sovereign immunity defense; in other words RNUR gains a strategic advantage from its failure to properly plead and present its defense. If summary exercise of this Court's supervisory powers is called for, Supreme Court Rule 16.1, it would be for the purpose of ensuring that the case is remanded so that proper consideration of waiver and the factual basis of the immunity defense may be considered.

nonetheless be insufficient to satisfy the Due Process clause of the Fifth Amendment. The cases, including those cited by RNUR, support precisely the contrary conclusion: the minimum contacts test for analyzing personal jurisdiction is the same under either due process clause. *E.g. Republic of Argentina v. Weltover, Inc.*, ___ U.S. ___, 112 S.Ct. 2160, 2169, 119 L.Ed.2d 394 (1992) ("direct effect" element of 28 U.S.C. § 1605(a)(2) might be construed as embodying minimum contacts test); *Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo*, 485 F.Supp. 490, 492 (E.D.Wis. 1980) (legislative history shows incorporation of minimum contacts test in FSIA); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (applying minimum contacts due process analysis to FSIA).

This is precisely the conclusion reached in this case by the Eleventh Circuit in its most recent opinion.[3] 985 F.2d at 1545. Unsurprisingly, the Eleventh Circuit based its finding of personal jurisdiction under the FSIA on precisely those facts which had previously been found to support diversity jurisdiction under the Georgia long-arm statute. *Compare* 985 F.2d 1534, 1537-1541 *with* 975 F.2d 746, 747-753. RNUR does not seriously contend that, if the first decision is correct, the second would be incorrect.

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[3] As argued above, the Eleventh Circuit should not have addressed this issue.

It is not necessary to repeat here the facts which support the exercise of jurisdiction in the Northern District of Georgia. Those facts support diversity jurisdiction. They support jurisdiction under the FSIA. They do not support the grant of the petition for certiorari.

CONCLUSION

For the foregoing reasons, this case does not present a conflict between the Eleventh Circuit and other courts of appeals or any state court of last resort. The Eleventh Circuit has not so far departed from the usual course of proceedings as to call for the exercise of this Court's power of supervision.[4] No other issue of comparable

[4] Unless summarily done to vacate the decision of an issue not properly before the court. *See* n. 1, *supra* and text accompanying.

importance or necessity is presented by the petition for certiorari. It should be denied.

Respectfully submitted,

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